Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID R. SROGONCIK and VICKI SROGONCIK, his wife,

Petitioners,

v.

MICHAEL NICKLOW, JASON JACOBS, and SOUTH CONNELLSVILLE VOLUNTEER FIRE DEPARTMENT,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. **Whether the Commonwealth Court of Pennsylvania as approved by the Supreme Court of Pennsylvania erred in determining that the Petitioners failed to satisfy the burden of establishing facts sufficient to support a 42 U.S.C. §1983 claim?**

II. **Whether the Commonwealth Court as approved by the Pennsylvania Supreme Court erred in determining that Respondent, South Connellsville Volunteer Fire Department, is a local agency entitled to government immunity pursuant to Pa.C.S.A. § 8541?**

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OPINIONS AND ORDERS BELOW

The opinion and order of the Commonwealth Court of Pennsylvania, affirming the opinion and order of the Court of Common Pleas of Fayette County granting summary judgment to Defendant South Connellsville Volunteer Fire Department, filed November 2, 2005, was not reported and appears at Appendix p. 3A. The Petition for Reconsideration was denied on December 19, 2005, per order appearing at Appendix p. 19A. The panel consisted of the Honorable Judges, Bernard L. McGinley, Dan Pellegrini, and Senior Judge James R. Kelley. The opinion and order of the Court of Common Pleas of Fayette County, Pennsylvania, issued by the Honorable Judge Ralph C. Warman, granted summary judgment to Defendant South Connellsville Volunteer Fire Department, dated September 29, 2004. Appellants' Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, filed January 18, 2006, was denied by court order on May 23, 2006, and appears at Appendix p. 2A .

STATEMENT OF JURISDICTION

Petitioner seeks this Court's review of the decision by the Pennsylvania Supreme Court, dated May 23, 2006, not to accept an appeal of the judgment of the Commonwealth Court of Pennsylvania entered November 2, 2005, which affirmed the decision of the Common Pleas of Fayette County, Pennsylvania, granting summary judgment to Defendant South Connellsville Volunteer Fire Department, dated September 29, 2004. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment XIV, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This matter involves an appeal from an order granting Respondent, South Connellsville Volunteer Fire Department, Motion for Summary Judgment issued by the Court Of Common Pleas of Fayette County, Pennsylvania. The decision of the trial court was rendered by the Honorable Judge Ralph C. Warman and affirmed by a Commonwealth Court panel.

The Respondent Fire Department filed preliminary objections on October 24, 2002. In disposing of the preliminary objections, the Honorable Judge Steve P. Leskinen dismissed Petitioners' respondeat superior claim after which the Defendant filed a motion for summary judgment on February 5, 2004. Oral argument was not held until May 25, 2004 in order to allow Petitioners to conduct additional discovery. Once the motion was granted in favor of Respondent, the Petitioners filed a notice of appeal with the Superior Court of Pennsylvania on October 28, 2004. Subsequently, the Petitioners filed a motion to transfer the appeal, which was granted and the appeal was transferred to the Commonwealth Court of Pennsylvania, on January 14, 2005.

After oral argument, a panel of the Commonwealth Court, comprised of Honorable Judges, Bernard L. McGinley, Dan Pellegrini, and Senior Judge James R. Kelley, issued an unpublished opinion and order, authored by Judge Pellegrini, affirming the Court of Common Pleas of Fayette County, Pennsylvania, decision granting summary judgment to Defendant South Connellsville Volunteer Fire Department. In sum, the Commonwealth Court affirmed that Petitioners had failed to establish that Respondent had acted under color of law sufficient to state a cause of action pursuant to 42 U.S.C. §1983. Notwithstanding the aforementioned finding, the lower court also affirmed that the Defendant Fire Department was a local agency/state actor for purposes of state governmental immunity.

The facts of the case follow:

On or about June 24, 2000, Petitioner, David Srogoncik, traveled to the South Connellsville Volunteer Fire Department parking lot where he was assaulted by Defendant Michael Nicklow, a member of the South Connellsville Fire Department. (R.R. p.456a). The altercation occurred when Petitioner exited his vehicle to have a discussion with Defendant Jason Jacobs, also a member of the Fire Department, who was in the parking lot with a number of other volunteer fire fighters including Defendant Nicklow. (R.R. p.369a).

With little or no provocation, Defendant Nicklow viciously attacked the Petitioner and knocked him to the ground and kicked his body and head in a repeated fashion until he was unconscious and bleeding from the head. (R.R. pp.456a, 458a). No other member of the Fire Department intervened or stopped Defendant Nicklow until after the Petitioner had suffered life-threatening head trauma and multiple facial fractures. (R.R. p.779a). Following the assault a shoe print was found on the Petitioner's head which matched the thread pattern of Defendant Nicklow's shoe. (R.R. p.741a). It is important to note that due to the military service of the individual Defendants the Petitioners were only able to obtain service upon the Defendant Fire Department whose Motion for Summary Judgment was granted and is at issue on appeal.

The officer in charge, Lt. Keedy, went to the scene. Instead of controlling the fight, he recognized the girl at the scene as the daughter of the woman he was dating. Instead of giving proper orders to his men, he picked up the girl and whisked her from danger.

Petitioners commenced this lawsuit by filing a praecipe for Writ of Summons on June 24, 2002 after which a complaint was filed on October 15, 2002. The complaint alleges that the actions of

the Defendants deprived Petitioner of his civil rights, including but not limited to: Petitioner being assaulted or being permitted to be assaulted without interference until it was too late. As such said assault violated Petitioner's right to be secure in his person contrary to his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Furthermore, the complaint alleges that the Respondent Fire Department and its officers have established, developed, ratified, approved or otherwise encouraged by and through its agents the following patterns of conduct creating policies or other de facto usages, customs, practices, and procedures, including the following:

a. The Department has pursued a custom, policy, and/or procedure of failing to provide appropriate training of its personnel in the proper usage of force and in the inappropriateness of assaulting members of the public, including the Petitioner, and failing to provide training for its personnel to intervene when a member of the public is being assaulted by one of its personnel.

b. The Department failed to have a policy concerning usage of force by its personnel, and to have a policy against assaulting members of the public, including the Petitioner. It failed to have a policy of having personnel intervene and stop any of its individuals who are committing such assaults.

c. Respondent Fire Department failed to have adequate procedures in its hiring and training practices to determine if an employee had a propensity toward violence in conducting his affairs.

d. In the event the Department had such policies, procedures or training in place, the Department failed to enforce such policy or training, and its actions constitute a reckless disregard and/or deliberate indifference to the rights of the public and to the

Petitioner in particular.

e. Respondent Fire Department encouraged the instant conduct by failing to take appropriate disciplinary action. The South Connellsville Fire Chief instead defended Nicklow's actions and disparaged the criminal action taken against him. Respondent and its officials have thus fully ratified the improper conduct of its personnel.

f. The Respondent Fire Department failed to provide sufficient security on its premises to prevent an assault by one of its members on a member of the public on said premises.

See Complaint at App., pp. 20A-29A.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari to decide whether the Commonwealth Court of Pennsylvania misapplied federal law to Petitioners' substantive due process and state-created danger causes of action pursuant to 42 U.S.C. §1983, in an effort to rectify the improper grant of summary judgment to Respondent Fire Department, provide guidance to state courts in applying federal legal standards, as well as to facilitate and engender confidence among state plaintiffs otherwise forced to assume the risk of adjudicating federal claims in state court.

In the instant case, counsel for the Petitioner expresses a belief, based on a reasoned and studied professional judgment, that the panel of the Commonwealth Court of Pennsylvania has decided a question of substance, not previously decided by the Pennsylvania Supreme Court, in a fashion inconsistent with decisions of this

Court, as well as those of the United States Court of Appeals for the Third Circuit and other federal courts.

Essentially, it is respectfully submitted that the lower state courts applied common state law principles associated with scope of duty when they should have applied federal law principles associated with violating rights under color of law. Since these are understandable and common errors when state courts, who rarely have contact with federal causes of action, confront federal doctrines, this Court is respectfully requested to grant certiorari to aid in the uniform application of a fair reading of federal law for the guidance of the respective state benches and bars.

At page 9 of the Memorandum Opinion, the Commonwealth Court made the following observations:

> In this case, Nicklow, Jacobs and the others were not pursuing the goals of SCVFD; they were at the fire hall not to conduct any firefighting activity, but for a social event, and Srogoncik's injuries were the result of a personal altercation that had nothing to do with firefighting. Because the volunteers were engaged in a personal dispute, were not following or carrying out orders of anyone in authority or acting in their capacity as firefighters, and were not training to fight fires, when they engaged in the purported deprivation of Srogoncik's constitutional rights, they were not acting under color of state law. Simply put, they were not fighting fires; they were engaged in a fight over a girl. Because they were not acting under state law, any claimed failure of SCVFD to have a policy or custom and such became irrelevant, and the trial court properly granted summary judgment as to the Section 1983 claim contained in Count I of the complaint.

See Memorandum Opinion at App., p.13A.

Overall, the Petitioners submit that there are several errors of law and material fact revealed by such reasoning. First, the lower court failed to take into account that the record reveals that fire department members in general are expected to maintain security at fire hall functions.(R.R. p. 612a, 918a). As such, there is clear need to train these fire fighters to handle potential altercations between private citizens and/or actual members during quasi-public functions such as the dance and bingo operations that were in session the night in question.

Moreover, it is maintained that the Commonwealth Court Opinion failed to consider that decision-makers for the fire department, more particularly the acting chief, Edward Keedy, and the safety officer, Donna McDougle, were clearly on duty, did not directly engage in the fight, yet were deliberately indifferent to their responsibilities concerning maintaining order, thus establishing an independent ground for liability.

Finally, Petitioners maintain that the Commonwealth Court Opinion failed to address the issue of whether the fire department decision-makers were responsible for a "state created danger". This theory would hold the fire department responsible for the opportunity for harm by the third parties, i.e. the firemen acting outside the scope of their duties.

Notably, the Commonwealth Court panel cites to Mark v. Borough of Hatboro, 51 F.3d 1137, 1151 (3d Cir. 1995), for the rationale that when a person is pursuing his own goals and is not in any way subject to control by his public employer, he is not acting under color of law unless he purports or pretends to do so.(*See* Opinion at App., pp. 12A-13A). However, while recognizing that the Third Circuit in Mark held that volunteer fire companies were

state actors for all purposes, in a footnote the lower court points out that the Commonwealth Court has not adopted such a broad holding and has otherwise limited the same for purposes of §1983 actions to when they are carrying out firefighting activities. See id. Petitioners submit that this state law basis for the lower court's decision regarding the application of federal law supports their theory that the same has been misapplied. Furthermore, to the extent that the lower court did rely on the reasoning in Mark, supra, the case sub judice is distinguishable.

In particular, the facts of Mark demonstrate that the private actor set a fire secretly, giving no one the impression that he was acting on behalf of the volunteer fire company, his public employer so to speak. See Mark, 51 F.3d at 1151. Here, we have a small group of firefighters, including an assistant chief and safety officer, arguably on duty at the firehall, either awaiting a call and/or providing security for the benefit of the fire department, who at the very least appeared to be pursuing the goals of and subject to control by the same.

Title 42 U.S.C.A. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief

> shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Section 1983 does not create any substantive rights, it merely provides remedies for deprivations of rights established by the Constitution or under federal laws. Brown v. Commonwealth of Pennsylvania Department of Health, 318 F.3d 473, 477 (3rd Cir. 2003).

The initial inquiry in any Section 1983 action is whether the following two essential elements have been established: (1) whether the conduct complained of was committed by a person acting under the color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. Frazier v. City of Philadelphia, 756 A.2d 80 (Pa.Cmwlth. 2000). The United States Supreme Court has held that local government entities are "persons" who may be liable under Section 1983. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). More specifically, volunteer fire departments established in accordance with Pennsylvania laws are considered "persons" under Section 1983. Mark v. Borough of Hatboro, 51 F.3d 1137 (3rd Cir. 1995).

Because the claim against the Respondent Fire Department is based upon a federal civil rights statute, the doctrine of respondeat superior is inapplicable. Andrew v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir, 1990). "When a suit against a municipality is based on § 1983, the municipality can only be liable when the alleged constitutional transgression implements or executes a policy, regulation or decision officially adopted by the governing body or informally adopted by custom." Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir, 1996), cert. denied 117 S.Ct. 1086 (1997) (citations omitted). Therefore, to recover on a § 1983

claim against an entity, a plaintiff must prove: (1) that he/she suffered a constitutional injury; and (2) that the injury occurred as a result of the municipality's practice, policy or custom of deliberate indifference. City of Canton v. Harris, 489 U.S. 378 (1989). The "right to be secure in one's person" is an aspect of the liberty protected by the due process of law clauses of both the fifth and fourteenth amendments, and assaults and batteries by persons acting under "color of law" are actionable in Sec. 1983 suits e.g. Read v. Philadelphia Housing Authority, 372 F. Supp 686 (Ed. Pa., 1974) which stated "it is beyond question that a private citizen who is assaulted by a police officer can state a claim for relief under 42 U.S.C. § 1983."

Other circuits have made it clear that in the context of an assault, it is not even necessary to show that the officer actively participated in the beating. It is enough if the officer failed to intervene in a beating being administered by another officer in his presence. Bruner v. Dunaway, 684 F.2d 422 (6th Cir,1982) cert. den.

The Second Circuit in Dwares v. City of New York, 985 F.2d 94 (2nd Cir, 1993) found a violation of the due process clause where police permitted "Skinheads" to subject American Flag burners to a prolonged assault in their presence without interfering with the attack. It was found that there was a tacit agreement that the skinheads would not be impeded or arrested. This is similar to the instant case where numerous members of the Fire Department confronted the Plaintiff, who was drunk beyond the ability to defend himself. The numerous Fire Department members permitted the vicious attack to occur without intervention until the police arrived. There was a tacit understanding that the firemen would protect each other without concern for the rights of the Plaintiff, inferable from the totality of circumstances. (R.R. pp.835-37a).

"Policy is made when a 'decision maker possess[ing] final

authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict." Andrews v. City of Philadelphia, 895 F.2d 1469,1480 ((3rd Cir. 1990); citing Pembaur v. City of Cincinnati, 475 U.S. 469,481, 106 S.Ct. 1292,1299, 89 L.Ed. 2d. 452 (1986). Alternatively, a custom is defined as a course of conduct or a practice which is so widespread, well settled and permanent, that it virtually constitutes law. Andrews v. City of Philadelphia, supra; citing Monell v. New York City Dept. of Social Services, supra.

The Third Circuit Court of Appeals has sought to elucidate these standards. A recent case with a discussion of the issue is Natale v. Camden County Correctional Facility, 318 F.3d 575 (3d Cir., 2003), where the court outlined three situations where municipal or entity liability could apply:

> There are three situations where acts of a government employee may be deemed to be the result of a policy or custom of the governmental entity for whom the employee works, thereby rendering the entity liable under § 1983. The first is where "the appropriate officer of entity promulgates a generally applicable statement of policy and the subsequent act complained of is simply an implementation of that policy." Bryan County, 520 U.S. at 417, 117 S.Ct. 1382 (Souter, J., dissenting). The second occurs where "no rule has been announced as policy but federal law has been violated by an act of the policymaker itself." Id. Finally, a Policy or custom may also exist where "the policymaker has failed to act affirmatively at all, [though] the need to take some action to control the agents of the government 'is so obvious, and the inadequacy of existing practice so likely to result in the violation of constitutional rights, that the

policymaker can reasonably be said to have been deliberately indifferent to the need.'" Id. at 417-18, 117 S.Ct. 1382 (quoting City of Canton, Ohio v. Harris, 489 U.S. 378, 390, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)); see also Berg, 219 F.3d at 276 (holding that plaintiff must "demonstrat[e] that the municipal action was taken with 'deliberate indifference' to its known or obvious consequences").

In regard to the lower court's conclusion that because the volunteers were only engaged in a personal dispute over a girl and not acting in their capacity as firefighters their alleged conduct was not under color of state law, the facts suggest otherwise.

The record reveals that the Fire Department members in general are expected to maintain security at fire hall functions. (R.R. pp.612a,918a). As such, there is a clear need to train these firefighters to handle potential altercations between private citizens and/or actual members during quasi-public functions such as the dance and bingo operations that were in session the night in question. Thus, there remains a genuine issue of material fact, as well as law, as to whether such security activities qualify as state action in this case.

There is testimony that a crowd of people had congregated in the parking lot prior to the assault and that several firefighters approached the car, wrestled the Petitioner to the ground, and then either participated in or watched him be continually and severely beaten. (R.R. pp.706a,711a,774a-79a). It is obvious that had either one of the decision-makers or any other firefighter, doubling as security and present at the scene, been properly trained in crowd control, non-physical intervention, and/or proper use of force, the resulting gang-style beating of the Petitioner could have been avoided.

In the lower court the Respondent maintained that the Petitioner has failed to demonstrate deliberate difference with regard to its failure to discipline its members involved in the incident. Notwithstanding Respondent's contention that the firefighters who witnessed the incident believed that the Petitioner attacked the firefighters and therefore no discipline was warranted, Petitioner directs the Court's attention to the failure to discipline that occurred leading up to the assault.

The record reveals that throughout the day leading up to the assault, both Lt. Keedy and Safety Officer Donna McDougle were well aware of the explosive tension building up amongst the members. Lt. Keedy fielded a phone call and overheard the use of threatening language and yet issued no reprimand to those involved despite his knowledge of the source of the disagreement which included firefighters Jason Jacobs and Robert Helms. (R.R. pp.611a,613a). Additionally, Donna McDougle personally witnessed a confrontation on the premises earlier that day and yet issued no reprimand to the firefighter involved. (R.R. p.904a). She did report the incident to Lt. Keedy who once again failed to discipline anyone involved. (R.R. pp. 611a,613a).

The record further reveals that firefighters utilized the Fire Department phone to argue and challenge the civilians to come to the Department and face off. (R.R. pp. 645a-47a, 689a). However, nothing was done to stop the escalating aggressive behavior. Instead, Lt. Keedy merely told everyone to wait and see if the threats came to fruition and as a result emboldened the firefighters to lie in wait without fear of repercussion. (R.R. p.751a). Ultimately, the interested members, having been allowed to wait and plan strategies for the impending altercation, assembled five or six specifically chosen members to approach the car of civilians when it arrived. (R.R. p.835a).

The highest ranking member on the scene, Lt. Keedy abdicated his responsibility and failed to intervene. Scott Sage, acting Fire Chief for the last seven years, stated that according to protocol he would expect an order to stop fighting to be given in such a situation and that as such it should have been followed. (R.R. pp.593-4a). Lt. Keedy supported this notion and attested that as Lieutenant he could order the other members to secure the scene and break up any fights. (R.R. p.630a). However, no such order was given by anyone.

As previously mentioned, no matter which scenario is accepted as the truth, deliberate indifference on the part of Lt. Keedy, as an official decisionmaker, is evident. If Lt. Keedy was actually at the scene of the fight and participating it is clear that no order to cease and desist was issued. Alternatively, if Lt. Keedy left the scene in an attempt to remove his girlfriend's daughter from harm he again clearly abdicated his responsibility. According to the testimony of Robert Helms, when Lt. Keedy did leave the scene he failed to place someone else in charge. (R.R. p.829a). Based on his knowledge of the previous incidents and his belief that a fight was about to ensue, his actions of: leaving the scene; failing to delegate command; as well as failing to inform the authorities, smack of deliberate indifference.

With regard to Ms. McDougle's actions, her testimony also indicates a failure to intervene. Similar to Lt. Keedy, she, too, had knowledge of the prior events, was present at the scene of the fight, and failed to alert the authorities. According to her deposition she actually witnessed Lt. Keedy carrying Angie from the scene of the fight. (R.R. pp.931-2a). If this true, then as acting Safety Officer, next in the chain of command, she had the authority to intervene. However, once again no orders to cease and desist were given, thus indicating another example of deliberate indifference to the civil rights of the Petitioner.

The common pleas court either ignored or made short shrift of these genuine issues of material fact and hinged its decision on three self-serving statements made by Lt. Keedy, himself: that he believed the threats to be hollow; that he did not know the first fight had broken out; and that he prevented a second potential fight from occurring. However, Lt. Keedy's own deposition contradicts this statement. Instead, Lt. Keedy admits that he was concerned that someone would show up, at least enough to warn Angie's mother and those already at the fire hall. (R.R. pp.613-14). Thus based on his knowledge of the earlier incidents, actual receipt of a threatening call, admitted concern of impending violence and in a light drawn most favorable to the Petitioners, Lt. Keedy's actions and/or omissions clearly rise to the level of deliberate indifference enough to survive a motion for summary judgment.

All of the above demonstrates the clear deliberate indifference on behalf of the Respondent through its decision-makers policy of failing to discipline, and furthermore establishes the direct causal link between said policy and the violation of Petitioner's constitutional rights.

The Commonwealth Court Opinion fails to address Petitioner's argument regarding the decision-maker theory. This failure ignores the relevant decision in Pembaur v. City of Cincinnati, 475 U.S.469, 106 S.Ct.1292 (1986), which held that government entity liability may be imposed for a single decision by decision-makers under the appropriate circumstances. Id. at 1298.

The Court defined a decision-maker for the purposes of governmental entity liability as an official who not only has discretion in the exercise of particular functions, but one who is also responsible, under state law, for establishing final governmental policy respecting such activity. See id. at 1299. It went on to state that where action is directed by those who establish governmental policy, the entity is equally responsible whether the

action is to be taken once or repeatedly. See id. at 1298. To deny compensation to the victim under these circumstances, the Court said, would be contrary to the fundamental purpose of Section 1983. See id.

Pursuant to this rationale, both Lt. Keedy and Safety Officer Donna McDougle taking their places in the chain of command can be deemed as decision-makers for the Respondent. (R.R.p.404a). Throughout the day leading up to the assault and during the assault, itself, both parties at different times were left in charge of the premises and the firefighters present. As such, their clear failure to intervene in and/or prevent the ultimate assault on the Petitioner reflects a custom or policy of the Fire Department.

STATE-CREATED DANGER

The Third Circuit also has adopted the state-created danger theory in Kneipp v. Tedder, 95 F.3d 1199 (3rd Cir.1996). To state a claim for a civil rights violation under the state-created danger theory a plaintiff must show: (1) foreseeable and fairly direct harm;(2) willful disregard of the harm to the plaintiff by the government actor; (3) a relationship between plaintiff and defendant; and (4) use of defendant's authority to create a danger that otherwise would not have existed. See Solum v. Yerusalim, WL 395720, *2-6 (E.D.Pa.,1999) and Brown v. Commonwealth of Pennsylvania, Dept. of Health Emergency Medical Services training Institute, 318 F.3d 473,479 (C.A.3(Pa.),2003) *citing* Kneipp at 1208. The Commonwealth Court found it unnecessary to assess the applicability of this theory.

i. Foreseeable and Fairly Direct Harm

The Respondent Fire Department, as a state actor, made a conscious and deliberate decision to utilize its own active members as a security service during the bingo and/or dance functions on the

night in question. As such, its official decision-makers in charge of providing said security can be said to be clothed with the authority of state law. And it is their failure to provide sufficient security to prevent an assault by one or more firefighters on the Petitioner that led to his injuries.

When deciding whether the ultimate harm was foreseeable or fairly direct, the Third Circuit has made a point not to analyze situations based on general harm, but rather focuses on the specific acts of the particular party inflicting the harm and the defendant's knowledge of the situation. See Solum v. Yerusalim at 4, *citing* Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 907 (3d.Cir.1997).

The events leading up to and including the assault clearly indicate that both Lt. Keedy and Donna McDougle, as heads of security acting under color of law, were well aware of the risk of physical violence. They both either witnessed and/or were informed of specific confrontations involving specific Department members throughout the day and yet failed to inform police, restrain or remove such individuals from the premises, disperse the crowd gathering in the parking lot among other obvious security strengthening measures.

Instead, we have the two decision-makers, whom, after making the conscious choice to handle the situation themselves, essentially abandon the scene, willfully disregarding their security duties. Lt. Keedy admitted that although he was aware of the impending physical violence, as well as his duties as lieutenant, he chose to flee the scene of the fight with the girl. (R.R. pp 613-14a, 618a). Donna McDougle attests to interrupting a potential fight earlier that day, reporting it to Lt. Keedy and then actually witnessing Lt. Keedy remove the girl from the scene of the fight. (R.R. pp..904a,924a,931-32a). If accepted as true, these statements indicate several important factors regarding foreseeability of harm.

First and foremost these statements place both state actors at the scene of the fight. While it may be true that Lt. Keedy left the scene right before the assault occurred, this action does not impact the foreseeability of harm to the Petitioner. Instead, it is important to recognize what inferences can be drawn from it. What we know is this: Lt. Keedy was privy to the earlier incidents and refused to inform police; he informed the present members of the threat and put them on the lookout; both state actors were on the scene prior to the fight; Lt. Keedy left the scene failing to place anyone else in charge or give orders not to fight; Ms. McDougle witnessed Lt. Keedy leave the scene and failed to intervene; Petitioner was physically assaulted by one or more firefighters.

One can infer that Lt. Keedy and Ms. McDougle actually witnessed the firefighters band together and approach the car containing the Petitioner and yet issued no specific orders. As such, it can be inferred that the state actors actually encouraged such behavior. And knowing that whatever hostilities had been engendered were about to be directed at those in the car, it is clear that either one could foresee the fairly direct harm about to befall the Petitioner.

ii. Willful Disregard

Petitioners must establish that Respondent was deliberately indifferent by acting in willful disregard of the rights of Mr. Srogoncik. The Third Circuit has explained that there is little difference between the terms "deliberate indifference," "reckless disregard," or "reckless indifference," but held that each term requires state action that falls somewhere between intent and negligence. See Brown v. Commonwealth of Pennsylvania, Dept. of Health Emergency Medical Services Training Institute at 479, *citing* Morse v. Lower Merion Sch. Dist. at 910.

Furthermore, the Third Circuit has held that while the "shocks the conscience" standard applies in cases where the state actor had to act with urgency, it is not required in all substantive due process cases. See id. at 480. It is debatable whether the state actors in the case at bar had to act with urgency, but the Petitioners maintain that deliberate indifference is evident either way.

When viewed in the context that both Lt. Keedy and Ms. McDougle had several hours to decide how to secure the scene, i.e. call the police, restrain or remove involved members, clear the parking lot, etc., urgency is not an issue. As such, their failure to do any of the above amounts to willful disregard with respect to the rights of the Petitioner.

Alternatively, when viewed in the context of the fight scene itself, urgency does play a part in the failure to provide sufficient security. The record reveals that Lt. Keedy was present immediately before the assault, yet he intentionally chose to leave the scene failing to issue any orders or delegate command. Essentially Lt. Keedy left the Petitioner at the mercy of the crowd, as well as the group of firefighters selected to confront the car, knowing full well that a fight could ensue. These actions, coupled with Ms. McDougle's failure to secure the scene after Lt. Keedy left allowing the Petitioner to be severely beaten, can be said to "shock the conscience."

iii. Relationship between Petitioner and Respondent

In order to establish the existence of a relationship imposing liability one must show that the defendant had specific knowledge of the particular plaintiff. See Solum, WL 395720 at 5 *citing* Mark v. Borough of Hatboro, 51 F.3d 1137,1152 (3rd Cir.1995). "The foreseeable plaintiff may be an individual or a discrete class, but government action or inaction with respect to the general public does not fall within the purview of § 1983." Id. *citing* Morse, 132

F.3d at 913. By limiting the group of foreseeable victims, the potentially broad reach of the state-created danger theory is constrained within its useful and intended limits. See id., *citing* Morse at 913, n.12.

A discrete class is a group of plaintiffs reasonably identifiable which must be distinguishable from the public in general. See id. In the case sub judice the discrete class of foreseeable victims were those five individuals present in the car. Based on knowledge ascertained throughout the day leading up to and immediately prior to the assault, Lt. Keedy was well aware that anyone present in the car was associated with the conflict involving the girl and was there to follow up on a threat. At the exact moment upon their arrival when Lt. Keedy realized what was about to happen, this discrete class of foreseeable victims, including the Petitioner, became even more readily identifiable and distinguishable from the general public. However, instead of providing sufficient security to prevent an assault on the Petitioner by one or more members of the Fire Department who had surrounded the car, both Lt. Keedy and Ms. McDougle failed to act.

iv. Opportunity created by Respondent Fire Department

Finally, the four part test requires a plaintiff to prove that the defendant acted affirmatively to create a danger or an opportunity for harm that otherwise would not have existed. See Solum, WL 395720 at 6,*citing* D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364,1373 (3rd Cir.1992).

The record reveals several affirmative acts on behalf of the state actors by way of their authority that created an opportunity for harm. Conscious and deliberate decisions were made by both decision-makers throughout the day leading up to and during the assault.

Despite firsthand knowledge of the threats and previous confrontations both Lt. Keedy and Ms. McDougle made decisions not to inform the police. The testimony of police officer Gregory Cominsky indicates that proper police procedure would have entailed seeking out those involved in the threat and either arresting them or warning them of their fate. (R.R. p.751a). Police assistance clearly would have helped prevent the ultimate outcome, but none was sought.

These actions were not mere omissions due to oversight, but rather affirmative choices to handle the situation within. Lt Keedy made this decision several times that day and took it a step further when he ordered those members present not to call the police until someone made good on the threat. (R.R. p.827a). It was this affirmative act that enabled the firefighters involved to rally together and prepare for the third confrontation.

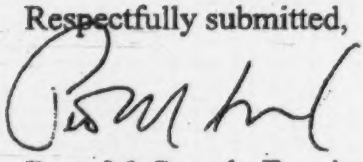
Finally, we have the affirmative act of Lt. Keedy deciding to grab the girl involved and flee the scene. This decision, though helpful to the girl, left four other foreseeable victims, including the Petitioner, vulnerable to a leaderless group of firefighters ready to pounce. When viewed together with the obvious failures to: intervene; disperse the crowd; restrain or remove Department members known to be involved; along with other well-known security measures, it is clear that the state actors created the opportunity for the gang-style beating of the Petitioner to occur on Fire Department premises.

It is respectfully submitted that the instant Petition for Writ of Certiorari should be granted. Federal civil rights actions may be brought in state court. It is important that a consistent body of law be established for the guidance of the bar and state courts, when this option is utilized.

CONCLUSION

Petitioners respectfully request that this Court grant the Petition.

Respectfully submitted,



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Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

August 15, 2006

Mr. Peter M. Suwak
Pete's Surplus Building
P.O. Box 1
Washington, PA 15301

Re: David Srogoncik, et ux.
v. Michael Nickow, et al.
Application No. 06A174

Dear Mr. Suwak:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on August 15, 2006 extended the time to and including October 20, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Sutter, Clerk
By
Sandy Spagnolo
Case Analyst

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

DAVID R. SROGONCIK AND
VICKI SROGONCIK, HIS WIFE,

Petitioners

v.

MICHAEL NICKLOW, JASON JACOBS,
AND SOUTH CONNELLSVILLE
VOLUNTEER FIRE DEPARTMENT,

Respondents

No. 24 WAL 2006
Petition for Allowance of Appeal from the Order of the Commonwealth Court

ORDER

PER CURIAM

AND NOW, this 23rd day of May 2006, the Petition for Allowance of Appeal is DENIED.

A true Copy Patricia Nicola
As of: May 23, 2006
Attest: s/Patricia Nicola
Chief Clerk
Supreme Court of Pennsylvania

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 462 C.D. 2005
Argued: October 17, 2005

David R. Srogoncik and Vicki Srogoncik, his wife,

Appellants

v.

Michael Nicklow, Jason Jacobs, and South Connellsville Volunteer Fire Department

BEFORE: HONORABLE BERNARD L McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: November 2, 2005

David R. Srogoncik (Srogoncik) and Vick Srogoncik, his wife appeal from an order of the Court of Common Pleas of Fayette County (trial court) granting South Connellsville Volunteer Fire Department's (SCVFD) motion for summary judgment and dismiss their complaint. Based on the undisputed facts, they failed to make out their 42 U.S.C. §1983[1] claim because they failed to establish that the harm

[1] 42 U.S.C. §1983 states in pertinent part:
(Footnote continued on next page...)

caused by the fire company's negligence was done under color of state law and their remaining claims were barred because SCVFD was a local agency entitled to governmental immunity pursuant to what is commonly know as the Political Subdivision Tort Claims Act (Tort Claims Act), 42 Pa.C.S. 7§8541-8542.

(continued...)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

The events leading to this appeal arise out of a "fight" involving Srogoncik and several members of SCVFD. Like a lot of fights, it involved a girl. During the late morning or early afternoon on June 24, 2004, Angie Liston (Liston) and Timothy Tarr (Tarr), who was her boyfriend, and two others, all of whom were minors, went by car to SCVFD to look for Liston's mother, Tracy Liston, who was dating Edward Keedy (KeedY), a Lieutenant of SCVFD. When they arrived, one of the males in the car yelled to Jason Jacobs (Jacobs), at one time Liston's boyfriend, and another SCVFD member that he wanted to fight them. Jacobs responded by telling them to leave and not come back.

Later in the day, several phone calls were made to Tarr's residence which caller I.D. indicated were originated from SCVFD, but when answered were followed by hang-ups. Eventually, someone spoke on the other end and challenged Tarr to come down to SCVFD later that day, presumably to fight, and Tarr agreed to do so. During the evening of June 24, 2000, while a dance bingo were being held at the firemen's social club (club), which is next door to SCVFD, Keedy received a call from Liston asking if Jacobs was at the fire station. Keedy said that he didn't know what members were over at SCVFD and then he heard male voices in the background on Liston's end saying that they "were ready to go to kick butt." Keedy then went back to the club and told Liston's mother what had been said, and the latter went outside and asked other volunteer firefighters to come get her if they saw Liston arriving at SCVFD. After Keedy spoke with Liston's mother, he informed the volunteer firefighters present that threats had been made and "something could transpire," but the threat was not taken seriously by the other firefighters.

Also, like a lot of fights, alcohol was involved. Tarr, along with his brother and the other friend who was present in the morning, picked up Srogoncik, the plaintiff/appellant in this case, because he was "bigger." Srogoncik, who was 42 years of age, had been drinking all day and was heavily intoxicated. They all drove to SCVFD's parking lot at approximately 10:00 p.m. They were met by a large group of individuals who were SCVFD members who were yelling at the car as it pulled into the lot. Srogoncik, who was still heavily intoxicated, quickly got out of the car and was immediately surrounded by several firefighters, who had been at the fire social hall for the dance and the bingo that was taking place, including Michael Nick low (Nicklow) and Jacobs. Srogoncik did not know either Nicklow or Jacobs at the time. Srogoncik began yelling at Jacobs when he got out of the car, but he did not throw any punches. While there is a dispute as to who started the fight, five or six SCVFD members knocked Srogoncik to the ground and began "stomping" on him. Srogoncik was severely beaten and became unconscious, suffering multiple facial fractures and life-threatening head trauma. No members of SCVFD intervened when the violence commenced, and the beating proceeded until the police arrived after being called by a convenience store across the street from SCVFD's parking lot.

Srogoncik filed a praecipe for summons against Nicklow, Jacobs and SCVFD to which only SCVFD filed a rule to file a complaint.[2] Srogoncik filed a four-count complaint which alleged as follows:

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[2] Due to the military service of Nicklow and Jacobs, they were only able to obtain service upon SCVFD.

* Count I alleges rights claim under 42 U.S.C. §1983 because Srogoncik was deprived of his right under the Fifth and Fourteenth Amendments to the United States Constitution to be secure in his person as a result of SCVFD maintaining a policy of deliberate indifference towards the violent conduct of its members on June 24, 2000, that caused his injuries.[3]

* Count II alleges that SCVFD was negligent in its acts and omissions during the day of the incident and caused Srogoncik's injuries.

* Count III is a claim for loss of consortium filed by Mrs. Srogoncik.

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[3] Srogoncik's arguments claimed that SCVFD was liable under §1983 1) SCVFD has pursued a custom, policy and/or procedure of failing to provide appropriate training of its personnel in the proper usage of force and in failing to provide training for its personnel to intervene during an assault on a member of the public; 2) SCVFD failed to have a policy concerning usage of force by its personnel, failed to have a policy against assaulting members of the public, and failed to have a policy of having personnel intervene and stop any of its members committing such assaults; 3) SCVFD failed to have adequate procedures in its hiring and training practices to determine if a member had a propensity toward violence in conducting his affairs; 4) in the event SCVFD had such policies, they failed to enforce them and its actions constitute a reckless disregard and/or deliberate indifference to the rights of the public; 5) SCVFD encouraged the instant conduct by failing to take appropriate disciplinary action and ratifying the conduct of its personnel; and 6) SCVFD neglected to provide sufficient security on June 24, 2000, despite having knowledge about an impending fight between those in the car and the firefighters present at the scene.

SCVFD filed preliminary objections demurring[4] to all of the counts of the complaint with all of them being denied except as to Count III which was granted because Nicklow's conduct was not performed with the intent of performing SCVFD's business or within the scope of his employment as a firefighter. SCVFD then filed an answer and new matter as well as a cross-claim against Nicklow and Jacobs.

After discovery was complete, SCVFD filed a motion for summary judgment claiming that Count I should be dismissed because the Section 1983 claim could not be made out as there was no evidence that any of the individuals who were involved in the altercation were acting under color of state law. The motion also sought dismissal of the negligence claim in Count II and the detective consortium claim in Count IV because volunteer fire companies are "local agencies under the Tort Claims Act and are immune from the cause of action set forth in those count." Concluding that Srogoncik failed to make out the necessary elements of a Section 1983 claim and that the negligence claims were barred because volunteer fire companies are local agencies entitled to governmental immunity, even when they are not engaged in

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[4] In its preliminary objections to Count I, SCVFD claimed that the trial court did not have jurisdiction to hear a Section 1983 claim as well. As to the other counts, it claimed that Srogoncik's allegations did not fall within the enumerated exceptions set forth in the Political Subdivision Tort Claims Act, 42 Pa. C.S. §8542, and that they did not plead a cause of action based on *respondeat superior* because they are based upon the intentional tortiuous activity of its members. The trial court denied the preliminary objection at to Count I because the case law clearly indicates that Section 1983 claims are cognizable in state courts and denied Counts II and IV because there had not been a determination that SCVFD satisfied the requirements to be considered a local agency for the purposes of immunity.

firefighting activities, the trial court granted SCVFD's motion and dismissed the remaining counts of Srogoncik's complaint. This appeal followed.[5]

I.

The threshold requirements that a plaintiff has to make out a claim under Section 1983 are that 1) the conduct complained of was committed by a person acting under color of state law, and (2) this conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States. *West v. Atkins*, 487 U.S. 42 (1988); *Frazier v. City of Philadelphia*, 756 A.2d 80 Pa.Cmwlth. 2000); *Urbanic v. Rosenfeld*, 616 A.2d 46 (Pa. Cmwlth. 1992), *aff'd*, 534 Pa. 266, 631 A.2d 596 (1993).[6] What is at

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[5] Our scope of review of an appeal from the grant of summary judgment is limited to determining whether the trial court committed an error of law or an abuse of discretion. *Rankin v. Southeastern Pennsylvania Transportation Authority*, 696 A.2d 536 (Pa. Cmwlth. 1992). We note that summary judgment may properly be granted where the moving party establishes that (1) there is no genuine issue of material fact that could be established by additional discovery or expert report and based upon the undisputed evidence, the movant is entitled to judgment as a matter of law, or (2) there is insufficient evidence to permit a jury to find a fact essential to the cause of action or defense. *Schnupp v. Port Auth. of Allegheny County*, 710 A.2d 1235, 1237 (Pa. Cmwlth. 1998). The trial court will be overturned on the entry of summary judgment only if there had been an error of law or an abuse of discretion. *Hetrick v. Apollo Gas Co.*, 415 Pa. Super. 189, 608 A.2d 1074 (Pa.Super. 1992).

[6] Under federal law, Section 1983 does not create any substantive rights, but merely serves as a "vehicle or ... 'device' by which a citizen is able to challenge conduct by a state official whom he claims has deprived or will deprive him of his civil rights." Harry Blackmun, Section 1983 and Federal Protection of Civil Rights--Will the Statute

issue in this appeal is whether Srogoncik made out the first threshold element - that the persons who injured him were acting under the color of state law.

Whether a person or entity is acting under color of state law, the person or entity inflicting the alleged constitutional deprivation must have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law at the precise time at which the alleged deprivation occurs. *Frazier*, 756 A.2d at 84 (citing *West v. Atkins*, 487 U.S. 42 (1988)). Because the doctrine of *respondeat superior* does not apply in Section 1983 actions, *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 1978, to incur Section 1983 liability, the state actor itself has to engage in negligent conduct that would directly cause a deprivation of a person's civil rights; liability cannot be

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Remain Alive or Fade Away? 60 N.Y.U.L. Rev. 1,1 (1985). "[O]ne cannot go into court and claim a 'violation of Section 1983'--for §1983 by itself does not protect anyone against anything." *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 1979). In effect, Section 1983 is a form of action akin to mandamus or equity which requires a party to meet certain threshold requirements before relief can be granted on the underlying violation. *Urbanic v. Rosenfeld.*

imposed merely because the local government employed someone who was negligent. Srogoncik contends that Nicklow, Jacobs and other SCVFD members were acting under color of state law that directly caused his alleged constitutional deprivation. He also claims that SCVFD is responsible for his injuries because it allowed an official policy or custom of deliberate indifference because Keedy, an officer of the company, knew that a fight was likely and took no action to prevent that fight.[7]

For a "person" or entity, such as SCVFD, to be found liable under Section 1983 based on the activity of individuals in its "employ," before even getting to the issue of whether any activity on its part in either facilitating the action of those individuals is actionable, it must first be established that an individual was acting under color of state law.[8] The phrase

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[7] A policy or custom may exist, so as to trigger liability under Section 1983, where "the policymaker has failed to act affirmatively at all, [though] the need to take some action to control the agents of the government is so obvious, and the inadequacy of existing practice so likely to result in the violation of constitutional rights, that the policymaker can reasonable be said to have been deliberately indifferent to the need." *Natale v. Camden County Correctional Facility*, 318 F.3d 575 (3d. Cir. 1993)(quoting *City of Canton, Ohio v. Harris*, 489 U.S. 378, 390, 109 S.Ct. 1197, 103 L.Ed. 2d. 412 (1989)).

[8] For the purposes of this opinion, we will assume that volunteer fire companies are "state actors" for purposes of Section 1983. While we recognize that in *Borough of Hatboro* the Third Circuit held that volunteer fire companies were state actors for all purposes, we have not adopted that holding. Under The Borough Code, Act of February 1, 1966, P.L. 1656, *as amended*, 53 P.S. §§45101-48501, a borough is authorized but not required "[t]o purchase, or contribute to the purchase of fire engines and fire apparatus, boats, rescue and life saving equipment and supplies for the use of the borough, and to appropriate money to fire

"under 'color' of law" has been interpreted to mean "under 'pretense' of law." *Screws v. United States*, 325 U.S. 91, 111 (1945). A person's actions are under pretense of law only if they are "in some way 'related' to the performance of his official duties." *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 838 (9th Cir. 1996)(quoting *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995)). By contrast, a person who is "pursuing his own goals and [i]s not in any way subject to control by

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companies, rescue unites and for the construction, repair and maintenance of fire company and rescue unites houses, including the acquisition of land for such purposes and, as set forth in this clause, for fire training schools and centers." Section 1202 of The Borough Code, 53 P.S. §46202. Nothing in The Borough Code or other similar authorizations for other classes of local government gives any power over how the volunteer company operates. In *Urbanic v. Rosenfeld*, 616 A.2d 46 (Pa.Cmwlth. 1992), *aff'd*, 534 Pa. 266, 631 A.2d 596 (1993), because they are private, non-profit corporations, we have held that volunteer fire companies, as private non-profit corporations, are not normally considered state actors and the only possibility that they could be considered as one is when they were carrying out firefighting activities. *See Mark v. Borough of Hatboro*, 856 F.Supp. 966 (E.D. Pa. 1994).

[his public employer]," *Id.* (quoting *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1151 3d Cir. 1995), *cert. denied*, 516 U.S. 858 (1995)), does not act under color of law, unless he "purport[s] or pretend[s]" to do so. *Id.* Persons who engage in confrontations for personal reasons unrelated to their "job" duties do not act under color of law. *Id.; see also Parrilla-Burgos v. Hernandez-Rivera*, 108 F.3d 445, 449-51 (1st Cir. 1997); *Barna v. City of Perth Amboy*, 42 F.3d 809, 815-18 (3d Cir. 1994); *Pitchell v. Callan*, 13 F.3d 545, 547-48 (2d Cir. 1994). For example, in *Borough of Hatboro*, a volunteer fire company was held not to be liable under 42 U.S.C. §1983 for fire set by one of its volunteers because the volunteer was not a state actor when he committed arson and, instead, acted in a purely private capacity; volunteers were to put out fires, not to set them.

In this case, Nicklow, Jacobs and others were not pursuing the goals of SCVFD; they were at the fire hall not to conduct any firefighting activity, but for a social event, and Srogoncik's injuries were the result of a personal altercation that had nothing to do with firefighting. Because the volunteers were engaged in a personal dispute, were not following or carrying out orders of anyone in authority or acting in their capacity as firefighters, and were not training to fight fires, when they engaged in the purported deprivation of Srogoncik's constitutional rights, they were not acting under color of state law. Simply put, they were not fighting fires; they were engaged in a fight over a girl. Because they were not acting under state law, any claimed failure of SCVFD to have a policy or custom and such became irrelevant, and the trial court properly granted summary judgment as to the Section 1983 claim contained in Count I of the complaint.

II.

Srogoncik also claims that the negligence claims should not have been dismissed on the basis of immunity under the Tort Claims Act because the trial court erred in finding that SCVFD was a "local agency" for the purpose of governmental immunity under 42 Pa.C.S. §8541. Even though volunteer fire companies are organized as non-profit organizations and are not specifically mentioned in any of the provisions of the Tort Claim Act, volunteer fire companies have been held to be local agencies. 42 Pa.C.S. §102. A brief history is in order.

Volunteer fire companies had been immune from liability for torts under the doctrines of charitable and governmental immunity because they were considered public charities and were also agencies performing a public function. *Radobersky v. Imperial Volunteer Fire Department*, 368 Pa. 235, 81 A.2d 865 1951), *overruled on other grounds by Icollingo v. Ewing*, 444 Pa. 299, 282 A.2d 206 (1971). When the Supreme Court abrogated both governmental immunity in *Ayala v. Board of Public Education*, 453 Pa. 584, 305 A.2d 877 (1973), and charitable immunity in *Flagiello v. Pennsylvania Hospital*, 417 Pa. 486, 208 A. 2d 193 (1965), volunteer fire companies, like governmental and charitable entities, also became subject to suit.

When local agency tort immunity was restored in 1979, it was unclear whether volunteer fire companies were entitled to immunity under its provisions because they were not specifically covered by the Act. Construing the term "local agency" to include volunteer fire companies, the Commonwealth Court, in *Wilson v. Dravosburg Vol. Fire Dept.*, 516 A.2d 100 (Pa.Cmwlth. 1986), found that they and

their members were entitled to immunity because in the performance of their public firefighting duties, they exist as an entity acting on behalf of local government unites. *See also Zern v. Muldoon*, 516 A.2d 799 (Pa.Cmwlth. 1986). Immunity also existed when volunteer fire departments were engaged in activities that were ancillary to their firefighting purposes such as when they are engaged in fire training exercises, *Weaver v. Union City Volunteer Fire Department*, 518 A.2d 7 (Pa.Cmwlth. 1986), and fire prevention activities. *Temple v. Milmont Fire Company*, 525 A.2d 848 (Pa.Cmwlth. 1987). That coverage is consistent when volunteer firefighters are entitled to workers' compensation coverage. By separate legislation, volunteer firefighters enjoy the same status as public employees when engaged in firefighting activities for the purpose of immunity and indemnification. 42 Pa.C.S. §8332.1.

In *Guinn v. Alburtis Fire Co.*, 531 Pa. 500, 614 A.2d 218 (1992) and *Salazar v. Taylor's Dining Room*, 533 Pa. 309, 622 A.2d 283 (1993), our Supreme Court answered the question whether volunteer fire companies were local agencies even when engaged in social activities. Those cases involved allegations of negligent serving of alcoholic beverages at fundraising picnics and social hall events. Once legally recognized as the official fire company by each municipality to which the fire company provides service, the Supreme Court held that a volunteer fire company is entitled at all times to governmental immunity, even when not engaged in firefighting activities, because Section 8541 is clear and unambiguous. Section 8541 provides that a local agency is "entitled to governmental immunity; it does not provide that a local agency is entitled to governmental immunity only when acting within the scope of its duties." *Guinn*, 531 Pa. at 503, 614 A.2d at 220.

Srogoncik claims that because the ordinance granting authority to SCVFD to prevent fires in the borough recognizes a separate entity, the South Connellsville Volunteer Firemen's Relief Association, as the recipient of funds, and because SCVFD does not consider its records to be open to the public as a local agency typically would, there is evidence to support his claim that SCVFD is not an agency for purposes of governmental immunity. However, whether there is any funding from the borough at all is irrelevant for the purposes of whether SCVFD is a "local agency" entitled to immunity. Rather, the determinative factor is whether it has been recognized by the Borough of Connellsville as an organization authorized to prevent and fight fires. Because there is no dispute that it has been recognized by ordinance by the Borough of Connellsville to fight and prevent fires, SCVFD is a local agency for the purpose of tort immunity, and summary judgment was, therefore, appropriate as to counts II and IV.[9]

Accordingly, because no claim under Section 1983 exists and SCVFD is a governmental entity entitled to

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[9] Srogoncik argues that it would be inconsistent for SCVFD to be entitled to immunity as a local agency if not considered a state actor for purposes of the Section 1983 claim. While we recognize that SCVFD's status as local agency for purposes of governmental immunity is relevant to whether SCVFD is a state actor for purposes of a Section 1983 claim, it is not determinative. *Mark*, 51 F.3d at 1146. A number of entities are granted immunity from suit for beneficial activity even thought they are not considered state actors. *See e.g.*, 7 P.S. §6020-91 (members of saving and loan associations); 10 P.S. §355 (charitable or religious organizations given immunity for food distribution). Furthermore, the issue of whether SCVFD is generally characterized as a s state actor does not decide the outcome of the Section 1983 claim because the conduct must still be under color of state law for there to be a valid cause of action.

immunity, the trial court order granting defendant's motion for summary judgment is affirmed.

s/Dan Pellegrini
DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 462 C.D. 2005

David R. Srogonocik and Vicki Srogoncik, his wife,

Appellants

v.

Michael Nicklow, Jason Jacobs, and South Connellsville Volunteer Fire Department

ORDER

AND NOW, this 2nd day of November, 2005, the order of the Court of Common Pleas of Fayette County, No. 1412 of 2002 G.D., is affirmed.

s/ Dan Pellegrini
DAN PELLEGRINI, JUDGE

Certified from the Record
NOV 02 2005
and Order Exit

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 462 C.D. 2005

David R. Srogonocik and Vicki Srogoncik, his wife,

Appellants

v.

Michael Nicklow, Jason Jacobs, and South Connellsville Volunteer Fire Department

ORDER

NOW, December 19, 2005, having considered appellants' petition for reargument and reconsideration, and appellee South Connellsville Volunteer Fire Department's response, the petition is denied.

BY THE COURT:

s/ James Gardner Colins
James Gardner Colins
President Judge

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA
CIVIL DIVISION

No. 1412 of 2002, G.D.

DAVID R. SROGONCIK and VICKI SROGONCIK, his wife,

Plaintiffs,

v.

MICHAEL NICKLOW, JASON JACOBS, and SOUTH CONNELLSVILLE VOLUNTEER FIRE DEPARTMENT,

Defendants.

COMPLAINT IN CIVIL ACTION
(AGAINST DEFENDANT SOUTH CONNELLSVILLE VOLUNTEER FIRE DEPARTMENT)

COMES NOW, the Plaintiff, David R. Srogoncik and Vicki Srogoncik, her husband, by and through their Counsel, Peter M. Suwak, Esquire and Dale M. Brown, Esquire, and bring the following causes of action:

INTRODUCTION

1. The Plaintiffs are adult individuals whose address is 1847 Breakneck Road, White PA 15490.

2. Defendant Michael Nicklow is an adult individual presently serving in the United States Navy. Defendant Jason

Jacobs is an adult individual presently serving in the United States Air Force. At the time pertinent to this complaint, both defendants were members of the South Connellsville Volunteer Fire Department.

3. Defendant South Connellsville Volunteer Fire Department is a duly organized municipal body providing fire protection and prevention services for South Connellsville Borough, and has a business address of 110 N. Arch, Connellsville PA 15425.

4. On or about June 24, 2000, Plaintiff David Srogoncik was in the South Connellsville Volunteer Fire Department parking lot when he was assaulted by Defendant Nicklow, a member of the South Connellsville Volunteer Department.

5. The altercation occurred when plaintiff exited his vehicle to have a discussion with Defendant Jacobs, a member of the South Connellsville Fire Department who was in the parking lot with a number of other volunteer fire fighters including Defendant Nicklow.

6. With little or no provocation, Nicklow viciously attacked Plaintiff Srogoncik and knocked him to the ground and kicked his body and head in a repeated fashion until he was unconscious and bleeding from the head. No other member of the Fire Department intervened or stopped Nicklow until after he had suffered life-threatening head trauma an multiple facial fractures. Following the assault a shoe print was found on the plaintiff's face which matched the tread pattern of Nicklow's shoe.

COUNT I - CIVIL RIGHTS VIOLATIONS

(Plaintiff David Srogoncik vs. South Connellsville Volunteer Fire Department)

7. The averments of Paragraphs 1 through 6 above are hereby incorporated as though fully set forth at length.

8. Defendant South Connellsville Volunteer Fire Department is a state actor being a duly organized municipal body and receiving financial assistance from the Commonwealth of Pennsylvania and from other local municipalities.

8. The actions of the Defendants, as previously outlined, deprived plaintiff of his civil rights, including, but not limited to, plaintiff being assaulted or being permitted to be assaulted without interference until it was too late. The assault resulting in serious body injury to Plaintiff was completely improper and unwarranted. Said assault violated plaintiff's right to be secure in his person contrary to the Plaintiff's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution.

9. The Defendant Fire Department and its officers have established, developed, ratified, approved or otherwise encouraged by and through its agents the following patterns of conduct creating policies or other de facto usages, customs, practices, and procedure, including the following:

a. The Department has pursued a custom, policy, and/or procedure of failing to provide appropriate training of its personnel in the proper usage of force and in the inappropriateness of assaulting members of the public, including the Plaintiff, and failing to provide training for its

personnel to intervene when a member of the public is being assaulted by one of its personnel.

b. The Department failed to have a policy concerning usage of force by its personnel, and to have a policy against assaulting members of the public, including the Plaintiff. It failed to have a policy of having personnel intervene and stop any of its individuals who are committing such assaults.

c. Defendant Fire Department failed to have adequate procedures in its hiring and training practices to determine if an employee had a propensity toward violence in conducting his affairs.

d. In the event the Department had such policies, procedures or training in place, the Department failed to enforce such policy or training, and its actions constitute a reckless disregard and/or deliberate indifference to the rights of the public and to the Plaintiff in particular.

e. Defendant Fire Department encouraged the instant conduct by failing to take appropriate disciplinary action. The South Connellsville Fire Chief instead defended Nicklow's actions and disparaged the criminal action taken against him. Defendant and its officials have thus fully ratified the improper conduct of its personnel.

f. The Defendant Fire Department failed to provide sufficient security on its premises to prevent an assault by one of its members on a member of the public on said premises.

10. These actions have served to deprive the Plaintiff of his civil rights, as previously outlined, under color of law, and hence violate the United States Constitution and are

actionable under 42 U.S.C. §1983.

11. As a result of the aforementioned, Plaintiff has been damaged as follows:

a. Physical injuries to his head including contusions and abrasions, concussion, and multiple fractures to his face and skull, causing coma and an extensive hospital stay.

b. Continued disfigurement and continued pain, numbness and weakness.

c. Medical bills in an amount to be determined and continuing.

d. Pain, suffering, inconvenience, loss of enjoyment of life, annoyance and other emotional distress.

e. Loss of reputation and attachment of social stigma.

f. Entitlement to punitive damages due to outlined outrageous conduct.

g. Declaration of violation of rights, as outlined.

h. Entitlement to counsel fees and costs under 42 U.S.C. §1988.

i. Such other relief as deemed appropriate by the Court.

WHEREFORE, this Honorable Court is respectfully requested to enter judgment against defendant South Connellsville Volunteer Fire Department and in favor of

Plaintiff David Srogoncik excess of $25,000.00. JURY TRIAL DEMANDED.

COUNT II: NEGLIGENCE
(Plaintiff David Srogoncik vs. South Connellsville Volunteer Fire Department)

12. The averments of Paragraphs 1 through 11 above are hereby incorporated as though fully set forth at length.

13. The assault and battery aforesaid and the injuries resulting therefrom were the proximate result of the negligence of Defendant Fire Department and were not due in any part to the actions of Plaintiff Srogoncik. The negligence, failure to act in accordance with the standards expected of a fire department and its officials in similar circumstances, lack of due care, recklessness and disregard of the Plaintiff's rights, include the following:

a. The Department negligently failed to provide appropriate training of its personnel in the proper usage of force and in the inappropriateness of assaulting members of the public, including the Plaintiff, and to train its personnel to intervene and stop assaults on the public by one of its personnel.

b. The Department negligently failed to have a policy concerning usage of force by its personnel, to have a policy against assaulting members of the public, including the Plaintiff, and to have a policy of intervening and stopping any of its personnel from assaulting members of the public.

c. Defendant Fire Department negligently failed to have adequate procedures in its hiring and training practices

to determine if an employee had a propensity toward violence in conducting his affairs.

d. In the event the Department had such policies, procedures or training in place, the Department negligently failed to enforce such policy or training, and its actions constitute a reckless disregard and/or deliberate indifference to the rights of the public and to the Plaintiff in particular.

e. The department negligently hired and/or retained a dangerous and violent employee.

f. Negligently failed to provide sufficient security on its premises to prevent an assault by one of its members on a member of the public on said premises.

14. As a proximate result of the aforementioned negligent conduct of the Defendant Fire Department, Plaintiff David Srogoncik has suffered injuries as more particularly set out in paragraph 11 above (except for paragraph 11h).

WHEREFORE, this Honorable Court is respectfully requested to enter judgment against defendant South Connellsville Volunteer Fire Department and in favor of Plaintiff David Srogoncik in an amount in excess of $25,000.00. JURY TRIAL DEMANDED.

COUNT III: ASSAULT AND BATTERY
(RESPONDEAT SUPERIOR)
(Plaintiff David Srogoncik vs. South Connellsville Volunteer Fire Department)

15. The averments of Paragraphs 1 through 14 above are hereby incorporated as though fully set forth at length.

16. The actions of Michael Nicklow set forth above constitute the tort of assault and battery.

17. As the employer of Michael Nicklow, Defendant Fire Department is responsible for the actions of its agent Michael Nicklow who was then in the performance of his duties as a member of the Fire Department.

18. As a result of said assault and battery, Defendant David Srogoncik has suffered injuries as more particularly set out in paragraph 11 above (except for paragraph 11h).

WHEREFORE, this Honorable Court is respectfully requested to enter judgment against defendant South Connellsville Volunteer Fire Department and in favor of Plaintiff David Srogoncik in an amount in excess of $25,000.00. JURY TRIAL DEMANDED.

COUNT IV: LOSS OF CONSORTIUM
(Plaintiff Vicki Srogoncik vs. South Connellsville Volunteer Fire Department)

19. The averments of Paragraphs 1 through 18 above are hereby incorporated as though fully set forth at length.

20. As a result of the accounts and conduct of the defendant as previously specified, and the injuries sustained by Plaintiff David Srogoncik, Plaintiff Vicki Srogoncik, his wife, was deprived ob the society of her husband and of his services and of his earnings.

21. As a result of the aforesaid injuries, Plaintiff Vicki Srogoncik was compelled to and did spend various sums of money in an attempt to cure her husband.

WHEREFORE, this Honorable Court is respectfully requested to enter judgment against defendant South Connellsville Volunteer Fire Department and in favor of Plaintiff Vicki Srogoncik in an amount in excess of $25,000.00. JURY TRIAL DEMANDED.

Respectfully submitted

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Complaint was served by First Class Mail, postage prepaid, upon the following:

Joseph M. George, Esquire
Margolis, George & Port
92 E. Main St., Suite One
Uniontown PA 15401

Dated: October 15, 2002

/s/
Dale M. Brown, Esquire